

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

DONOVAN JOHNSON,	)	CIV. NO. 07-00024 JMS-BMK
	)	
Petitioner,	)	
	)	FINDING AND
vs.	)	RECOMMENDATION THAT
	)	PETITION FOR HABEAS CORPUS
IWALANI WHITE, Interim Director,	)	BE GRANTED
Department of Public Safety, State of	)	
Hawaii; LANE BLAIR, Warden,	)	
Diamondback Correctional Facility,	)	
	)	
Respondents.	)	
_____	)	

FINDING AND RECOMMENDATION THAT PETITION FOR HABEAS  
CORPUS BE GRANTED

On January 17, 2007, Petitioner Donovan Johnson (“Petitioner”) filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. After careful consideration of the petition and all other filings, the Court hereby FINDS and RECOMMENDS that the petition for habeas corpus be GRANTED and that Petitioner be resentenced.

On August 31, 2004, Petitioner was convicted of theft in the second degree in violation of H.R.S. §708-831(1)(b), credit card theft in violation of H.R.S. § 708-8102(5), two counts of fraudulent use of a credit card under H.R.S. § 708-8100 (1)(b), and two counts of identity theft in the second degree in violation

of H.R.S. § 708-839.7 Petitioner was sentenced to (1) mandatory minimum terms of three years and four months for the identity theft convictions, (2) a mandatory minimum term of a year and eight months for the theft in the second degree, (3) three extended term sentences of ten years for the credit card theft and fraudulent use of a credit card, and (4) two extended term sentences of twenty years for identity theft in the second degree.

On May 3, 2006, the Hawaii Supreme Court affirmed Petitioner's conviction. Petitioner then filed the present action. In his petition he asserts two grounds for relief. First, Petitioner claims that the imposition of his extended term sentences violated Appendi v. New Jersey, 530 U.S. 466 (2000). Second, Petitioner claims that even if the imposition of extended term sentences does not violate Appendi, the prosecution did not prove all of the elements necessary for an extended term sentence to be imposed under Hawaii law.

Respondents (collectively "the State") filed an answer to the petition on April 3, 2007, and Petitioner filed a reply on April 5, 2007. On May 18, 2007, the State notified the Court that it was withdrawing its opposition to Petitioner's habeas petition.

Accordingly, the Court hereby FINDS that under Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006), Petitioner's extended term sentencing violated Appendi

and RECOMMENDS that habeas corpus be GRANTED and petitioner resented.

IT IS SO FOUND AND RECOMMENDED.



/s/ Barry M. Kurren  
United States Magistrate Judge  
Dated: June 4, 2007

Johnson v. White; Civ. No. 07-00024 JMS-BMK; FINDING AND RECOMMENDATION THAT PETITION FOR HABEAS CORPUS BE GRANTED.